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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 123

THE UNITED STATES OF AMERICA, APPELLANT

v.

SHELBY IRON COMPANY OF NEW JERSEY AND SHELBY IRON COMPANY OF ALABAMA

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinion of the District Court is found at page 74 of the record. The opinion of the Circuit Court of Appeals (R. 83) is reported in 4 F. (2d) 829.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 10, 1925. (R. 88.) Petition for appeal was filed and allowed on May 8, 1925. (R. 89, 90.) The jurisdiction of this Court rests on Section 241 of the Judicial Code as it stood prior to the effective date of the Act of February 13, 1925.

QUESTIONS PRESENTED

The case involves questions as to the respective rights of the United States and the Shelby Iron Company, a New Jersey corporation (hereinafter called the Iron Company), in a certain tract of land located in Shelby, Alabama. This tract was deeded by the Iron Company to the Shelby Chemical Company (hereinafter called the Chemical Company) pursuant to a contract between the Iron Company and the Chemical Company which recited that the Chemical Company was desirous of erecting a chemical wood-distillation plant thereon and provided for the reconveyance of the land to the Iron Company upon the termination of the contract. The contract expressly contemplated, and by implication permitted, the Chemical Company to place a mortgage upon the land to which the right to receive a reconveyance should be subordinate. The deeds erroneously described the Iron Company as "a corporation organized under the laws of the State of Alabama." The United States subsequently, pursuant to a contract with the Chemical Company, erected on the land in question a plant for the production of certain products resulting from wood distillation, the United States remaining at all times the owner of the plant. Thereafter the Chemical Company deeded the land to the United States under a supplemental contract which required such a deed and which further provided for a lease of the land and plant to the Chemical Company for three years at rentals aggregating

$260,000 (which the contract stated to be at least the fair commercial value of the plant), and a sale by the United States and purchase by the Chemical Company of the land and plant for $1 at the expiration of the lease, or, at the option of the Chemical Company, at any prior time upon payment of the difference between the total rentals of $260,000 and the sum of all rentals theretofore paid. The questions presented are:

(1) Did legal title to the land pass from the Iron Company to the Chemical Company, and from the Chemical Company to the United States, despite the erroneous description of the Iron Company in the deeds to the Chemical Company?

(2) If legal title passed from the Iron Company to the Chemical Company, and from the Chemical Company to the United States, did the United States at the time it acquired such title have notice, actual or constructive, of the Iron Company's right to receive a reconveyance upon the termination of its contract with the Chemical Company?

(3) Was the deed from the Chemical Company to the United States an absolute conveyance which was in violation of or subject to the Iron Company's right to receive a reconveyance of the land upon the termination of its contract with the Chemical Company, or merely a conveyance in the nature of a mortgage to secure performance by the Chemical Company of its obligation to pay the rental or purchase price provided for in the supplemental contract with the United States, and, as

such, contemplated and by implication permitted by the contract between the Iron Company and the Chemical Company to be placed upon the land in priority to the Iron Company's right to receive a reconveyance?

STATEMENT

The United States brought suit in the United States District Court for the Northern District of Alabama, Southern Division, against the Iron Company and Shelby Iron Company, an Alabama corporation (hereinafter called the Alabama Company), alleging that the land in question in the case had been deeded by the Iron Company to the Chemical Company, and by the Chemical Company to the United States; that the United States had been in peaceable possession of the premises since December 23, 1922; and—

> That complainant's title to said land is denied or disputed by the defendants and that the defendants are now asserting or claiming to have some right or title or interest in or to said lands or to holding a lien or an incumbrance of some kind thereon * * *.

The bill prayed a decree that the defendants had no claim, right, title, interest in, or incumbrance upon the land, and "such other, further, and general relief as the equities of this cause" might require. (R. 1–3.)

The answer of the Iron Company denied that it had deeded the land to the Chemical Company, and

alleged that on October 1, 1890, the land had been deeded to it by the Alabama Company; that the Alabama Company had made and executed deeds purporting to convey the land to the Chemical Company; that at the time said deeds were made the Alabama Company had no title to or interest in the land, and therefore neither the Chemical Company nor the United States obtained any right, title, or interest in or to the land under said deeds; and that the Iron Company had never parted with the title to the land obtained under the deed from the Alabama Company. The answer set forth in conclusion that the United States had no title to the land and that "such title resides in this defendant." (R. 3–5.)

The answer of the Alabama Company denied that the Iron Company deeded the land to the Chemical Company, and alleged that the Alabama Company made and executed the deeds to the Chemical Company; that the Alabama Company did not deny or dispute the title of the United States or assert or claim "any right, title, or interest in or to said lands or a lien or encumbrance thereon;" and that on October 1, 1890, the Alabama Company conveyed to the Iron Company all of its real estate, including the land in question, and since that date had had no title to, interest in, or claim upon the land in question. (R. 5–6.)

Both the answer of the Iron Company and the answer of the Alabama Company were sworn to by Morris W. Bush, as President. (R. 5, 6.)

The United States filed an amendment to the bill of complaint (R. 6, 7), by which it added an allegation that by the conveyance to the Chemical Company—

> it was the true intention of the parties to convey all of the right, title, and interest of the Shelby Iron Company, a corporation of New Jersey, but that through mistake, or fraud, or inadvertence, said conveyance was made and executed from the Shelby Iron Company, a corporation of Alabama. (R. 7.)

The prayer for relief was also amended to ask the court to decree—

> that the conveyance made and executed by the said Shelby Iron Company, a corporation of Alabama, be reformed so as to make it a conveyance by the Shelby Iron Company, a corporation of New Jersey, as was the true intent of the parties at the time said conveyance was made by the Shelby Iron Company, a corporation of Alabama. (R. 7.)

The Iron Company then filed an answer to the bill as amended. (R. 7–36.) It alleged, first, that the United States was not entitled as against the Iron Company to have the deeds made by the Alabama Company reformed—

> for the reason that this defendant was not a party to any of said deeds, the grantor therein being a separate and distinct corporation, this defendant being in no wise re-

sponsible for any of the acts or omissions of the Shelby Iron Company, a corporation organized under the laws of the State of Alabama. (R. 7.)

It further alleged that the United States was not entitled as against the Iron Company to either a reformation of the deeds or a conveyance of the lands for the following reasons: That a contract dated April 8, 1918, was made by the Iron Company and the Chemical Company whereby the Iron Company was to deed to the Chemical Company sufficient ground on which to erect and construct a plant and buildings for the manufacture of charcoal and other by-products of wood distillation, and was to furnish the Chemical Company with a sufficient quantity of hard wood to operate the plant and other facilities for use in such operation, and the Chemical Company was to deliver charcoal to the Iron Company and was to reconvey the land to it upon the termination of the contract.

That the contract provided that the land might be deeded to and vested in the United States for the duration of the war. That the Chemical Company and the United States entered into a contract dated April 23, 1918, which recited that the Chemical Company had a contract with the Shelby Iron Company, of Shelby County, Alabama, according to the terms of which the Shelby Chemical Company shall receive all the lumber it may require from timberlands owned and leased by the Shelby Iron Company in return for all charcoal derived there-

from," and provided that the Chemical Company would grant and convey, or at the option of the Chief Signal Officer would lease, to the United States for the consideration of one dollar, a tract of land of adequate size for the erection of a plant for the production of certain by-products of wood distillation, that the United States would assume the expense of erecting the plant, that the entire output of certain by-products would be sold to the United States, that the Chemical Company might purchase the plant on certain terms, and that the United States would remove all buildings and equipment constituting such plant within six months from the end of the war and would reconvey the land to the Chemical Company if at the termination of the war the plant was still owned by the United States. That the plant was completed in 1919 and charcoal produced thereby was delivered to the Iron Company thereafter until about March 31, 1922. That the Chemical Company ceased to operate the plant at about that date and has since made no delivery of charcoal therefrom to the Iron Company. That on April 10, 1919, the Chemical Company made a deed to the United States reciting a consideration of $1 and other good and valuable considerations, which deed purported to convey the real estate on which the plant had been constructed.

The answer further alleged: That the Chemical Company did not have the legal title to the real estate, which was in the Iron Company, although

the deeds made by "The Shelby Iron Company, a corporation organized under the laws of the State of Alabama," had purported to convey the real estate to the Chemical Company. That on December 23, 1922, the Chemical Company, without the knowledge or consent of the Iron Company, and to the prejudice of the rights of the Iron Company, surrendered possession of the plant to the United States, and the United States has been in possession of the plant without having ever attempted to operate the same or to comply with the terms of the Chemical Company's agreement with the Iron Company to deliver charcoal to it. That on or about January 19, 1923, the Chemical Company was adjudicated a bankrupt. (R. 7–12.)

The answer concluded that by reason of the premises, the consideration moving to the Iron Company for the execution of said agreement with the Chemical Company had wholly failed; that the Chemical Company had disabled itself from carrying out the contract and making delivery of charcoal to the Iron Company; that the United States had no authority under the law to operate the plant or to carry out the terms of the contract, and that it would be grossly inequitable, unfair, unjust, and oppressive to the Iron Company for it to be compelled to convey the real estate to the United States. It prayed that the answer might be treated as a counterclaim and that it might be ordered and decreed that the deed from the Chemical Company to the United States should be can-

celed as a cloud on the title of the Iron Company, and that the possession of the premises on which the plant was situated should be delivered up by the United States to the Iron Company within such time and on such equitable terms as might be fixed by the court. (R. 12, 13.)

The answer contained no allegation that the United States had notice of the contract between the Iron Company and the Chemical Company except the allegation concerning the rental in the contract between the Chemical Company and the United States.

The United States filed a reply in which it alleged that the Iron Company was a party to the deeds in question; that it was the true intent and purpose of the Iron Company when the deeds were executed to convey all of its right, title, and interest to the land, and that as to the other matter alleged in the answer to its amended bill the United States—

> neither admits nor denies the matters and things therein set forth, but does assert that its rights under the original bill as amended filed in this cause are in no wise affected by any of the matters and things set forth * * *. (R. 36, 37.)

After evidence had been taken the court entered a decree that as between the United States and the Iron Company—

> * * * the title to said lands is in said defendant and the plaintiff has no claim to

> or interest in the said lands except that plaintiff is entitled to retain the possession of said lands for the removal of said plant for not exceeding six months from this date, and after such removal is made, and in any event on the expiration of six months from this date, the possession of said lands shall be surrendered by plaintiff to defendant. (R. 78.)

This decree was affirmed by the Circuit Court of Appeals. (R. 88.)

From the documentary and other evidence, it appears: After the Alabama Company conveyed all of its property to the Iron Company in 1890, the Alabama Company continued in existence but thereafter transacted no business and had no assets. The Iron Company owned the stock of the Alabama Company and its officers acted as the officers of the Alabama Company. (R. 43.) There was testimony that the existence of the Alabama Company was probably continued only for the purpose of protecting the name in Alabama. (R. 56.) Mr. Bush, the president of the Iron Company, who also acted as president of the Alabama Company, was authorized by the Board of Directors of the Iron Company to enter into the contract with the Chemical Company and to transfer the land in question in this case by warranty deed. He did not discover the error in the description of the grantor until three or four months before he testified, in August, 1923. At the time the deeds were given he delivered possession of the property to

the Chemical Company. He attempted and intended to execute the deeds for the Iron Company under the terms and conditions of the contract with the Chemical Company. (R. 43, 44.)

The contract dated April 8, 1918, between the Iron Company and the Chemical Company under which the Iron Company was to furnish the Chemical Company with land upon which to erect a plant for the manufacture of charcoal and by-products of wood distillation, and was also to furnish the Chemical Company with the wood, steam, electric energy, water, etc., necessary for the operation of the plant, and the Chemical Company was to deliver to the Iron Company the charcoal manufactured at the plant, contained the following provisions which are important (R. 16, 17, 18):

> Third. The Iron Company further agrees to deed by good and sufficient deed of general warranty, free from all liens and encumbrances, for the consideration of one dollar ($1.00) sufficient ground on which to erect and construct the plant and buildings of the Chemical Company together with the tracks of the Chemical Company. Inasmuch as the United States Government will be financially interested in the construction of the Chemical Company's plant, it is expressly agreed that said real estate may be deeded to and vested in the United States Government during the period of a contract made between the Chemical Company and the

United States Government, said contract to extend for the duration of the war.

* * * * *

Eighth. This contract shall extend until April 1st, 1933, with the right upon the part of the Iron Company to extend the same for a further period of five years upon notice in writing to the Chemical Company at any time on or before Oct. 1, 1932. Upon the termination of this contract on April 1, 1933, or at the end of the five-year renewal period herein provided, *the Chemical Company shall reconvey to the Iron Company all of the lands herein provided to be conveyed to it by the Iron Company, without cost to the Iron Company, free and clear of any encumbrances or liens whatsoever, or if there is any mortgage or there are any mortgages on the same not yet due, the Chemical Company shall pay over to the Iron Company the amount thereof or the amount of any bonds outstanding thereunder, with any accrued interest thereon,* and shall, if the Iron Company so elects and so notifies the Chemical Company by notice in writing, mailed to it at least thirty days prior to the termination of this contract or the five-year extension thereof, sell to the Iron Company all the improvements, equipment, and other personal property placed on said lands of said Chemical Company, and the price to be paid by said Iron Company to said Chemical Company shall be determined in the following manner: each of the parties hereto shall choose one arbitrator, who shall appraise

said property, and in the event that said two arbitrators can not agree upon the appraised value thereon, they shall choose an umpire, and the decision of one arbitrator and the umpire shall be conclusive and binding on both parties, provided, however, that should the Iron Company elect not to acquire said properties, the Chemical Company shall have six months time following the termination of this contract or the five-year renewal thereof, as the case may be, in which to remove all of the improvements, buildings, equipment, machinery, and other personal property placed on said lands by the Chemical Company, and said Chemical Company shall be obligated to restore said lands to the condition in which they were at the time of the execution of this contract as nearly as may be practicable.

It is understood that the Chemical Company is about to construct its plant under a contract with the United States Government, by the terms of which the Chemical Company is to become the owner of the land, buildings, equipment and improvements, if an enabling statute to that effect shall be passed by the Congress of the United States. Therefore, it is distinctly agreed that the foregoing provision as to reconveyance of the lands is subject to the obtaining of the title to said lands by the Chemical Company from the United States Government. (Italics ours.)

By deeds dated June 11, 1918, and June 17, 1918, land was conveyed to the Chemical Company pur-

suant to the above contract, the grantor being described, however, as "the Shelby Iron Company, a corporation organized under the laws of the State of Alabama." (R. 31–34.) The deeds were signed merely "Shelby Iron Company" without reference to the State of organization. (There was a third deed dated October 7, 1918, which described the grantor merely as "Shelby Iron Company, a body corporate" (R. 34, 35), but this covered a small piece of land which was not covered by the deed from the Chemical Company to the United States and we have therefore disregarded it in our discussion of the case.)

By the contract dated April 23, 1918, between the Chemical Company and the United States (R. 19–28), the latter was to construct, at an estimated cost of approximately four hundred thousand dollars, a plant for the production of certain by-products of wood distillation on land conveyed or leased to the United States at its option. The Chemical Company was to operate the plant and the United States was to purchase the by-products. The United States was to retain certain portions of the purchase price to constitute "depreciation and amortization" and "purchase" funds, and when these equaled the cost of the plant, with interest, the contractor was to purchase the plant at an amount which was called an appraised valuation, but which was really, through adjustment of rentals, to be the amount of its cost to the Government with interest at six per cent. (R. 23, 24.)

The contract contained, among others, the following recital (R. 19):

> Whereas, the contractor has a contract with the Shelby Iron Company of Shelby County, Alabama, according to the terms of which the Shelby Chemical Company shall receive all the lumber it may require from timberlands owned and leased by the Shelby Iron Company in return for all charcoal derived therefrom.

The following provisions of the contract are also important (R. 20, 25):

> ARTICLE I. The contractor will grant and convey, or, at the option of the Chief Signal Officer of the Army, will lease to the United States for the consideration of one ($1.00) dollar a tract of land at Shelby, Alabama, of adequate size and suitable location for the erection of the plant hereinafter described.
>
> Said conveyances shall be made subject to and upon the completion of an opinion by the Attorney General of the United States that by said conveyance the Government will derive an absolute title to the said premises in fee simple, free and clear of all encumbrances, and that the United States will have the right to expend money for the erection of improvements thereon.
>
> * * * * *
>
> ARTICLE VII. * * * It is agreed, however, that in case the Government takes over said plant or undertakes to operate it, by reason of the default of the contractor, or for any other reason, the Government's right

> to operate the same shall, except as may be expressly provided by statute, cease and terminate at the end of the present war. If at that time the sale of said plant to the contractor shall have been consummated, the Government will surrender possession thereof to the contractor, and if said plant is then still owned by the Government, it shall at its own expense, within six months from the end of said war, remove all buildings and equipment constituting such plant, from the ground upon which the same are erected, and shall without further consideration reconvey such ground to the contractor.

Article XVII contained provisions requiring the Chemical Company to purchase and the United States to sell the plant at an appraised value upon termination of the contract by the Government because of cessation of hostilities or a general armistice bringing hostilities to a close. (R. 27, 28.)

Under date of January 25, 1919, the war having ended and the United States having no further need for the material covered by its contract with the Chemical Company (none of which had yet been produced), it entered into a supplemental contract with the Chemical Company. (R. 59–64.) This supplemental contract recited that the United States desired to cancel the contract of April 23, 1918, and the construction contract made pursuant thereto (R. 64), and that the Chemical Company in pursuance and in performance of said contracts

had incurred expenses and obligations of approximately $490,000, and in addition certain expenses for freight, all of which the United States was legally bound to pay "by way of reimbursement." (R. 59, 60.) It also contained the following recitals (R. 60):

> Whereas, the present fair commercial value of the said partially completed plant is not in excess of two hundred sixty thousand dollars ($260,000); and
>
> Whereas, the contractor is willing to accept from the Government in full and final settlement of all its rights, claims and demands against the Government under or growing out of said contracts (*a*) a lease to the contractor by the Government of the said partially completed plant until the contractor has fully paid for the same as hereinafter provided, and thereafter a sale and conveyance to the contractor by the Government of the said partially completed plant and the Government's right, title and interest in and to the tract of land upon which the same is erected for the sum of two hundred sixty thousand dollars ($260,000) in the manner and upon the terms and conditions hereinafter described; and (*b*) the payment by the Government to the contractor of the sum of four hundred ninety thousand dollars ($490,000) plus freight charges which have heretofore been paid by the contractor on account of the transportation of material necessary for the construction of said plant, and which the contractor may hereafter pay on

account of the transportation of such material purchased by the contractor prior to December 1, 1918, less such sums as the Government has heretofore paid to or for the contractor on account of said contracts, including payments on account of said freight charges, and the Government, for the purpose aforesaid, is willing to make such lease, sale, conveyance, and payment unto the contractor.

The supplemental contract then provided that it should effect a termination of the prior contracts, that the United States should pay the Chemical Company the amount of its expenses and obligations, and that upon such payment the United States should become and be the absolute owner, free of all liens and claims whatsoever, of the partially completed plant, the tract of land upon which the same was located, and all other property then paid for by the United States. (R. 60, 61.) It further provided as follows (R. 61–63):

ARTICLE III

(1) Immediately upon the payment unto the contractor by the Government of the sums described in Article II, section (1), of this contract, the Government shall and will lease (and the execution of this contract shall be understood to be and treated as con'tuting such conclusive evidence by the Government and the acceptance by the contractor) unto the contractor for a term of years beginning forthwith and ending three

years from the date of this contract, all of the property, real, personal, and/or mixed, described in Article II, section (2) of this contract, upon the following terms and conditions, viz:

(*a*) The contractor shall pay unto the Government immediately upon the execution of this contract the sum of fifty thousand dollars ($50,000) to apply on account of the rental of the plant during said period, and in one year from the date of this contract the contractor shall pay the further sum of fifty thousand dollars ($50,000); and two years from the date of this contract, the further sum of seventy-five thousand dollars ($75,000); and in three years from the date of this contract, the further sum of eighty-five thousand dollars ($85,000); all of which sums shall apply as rental for the said property during said period;

(*b*) In addition to the afore-described rent, and as additional rental, all taxes of every kind whatsoever, if any, levied or assessed upon said property, or any of it, by any taxing power, during the period of the time beginning with the date of this contract, and ending three years thereafter, shall be paid by the contractor at its own expense; and

(*c*) The contractor shall, at its own expense, complete said plant as early as possible, and in no event later than June 1, 1919, and shall keep and maintain all of the said property, including said plant, in good condition and repair.

(2) At the expiration of three years from the date of this contract, the Government, for the consideration of the sum of one dollar ($1), shall and will sell and convey unto the contractor by proper instrument or instruments of conveyance and the contractor shall and will purchase from the Government for said sum all of the Government's right, title and interest in and to the property described in Article II, section (3) of this contract, in its then state of repair and condition, whatever the same may be. Should the contractor not then being in default for any unpaid payments required to be paid by it under the terms of this contract, desire at any time prior to that date, to purchase said property in its then state of repair and condition, it is expressly agreed that the Government shall and will forthwith sell and convey the same unto the contractor for a sum equal to the difference between (*a*) the sum of two hundred sixty thousand dollars ($260,000) and (*b*) the total sum of all rents (exclusive of amounts for taxes previously paid by the contractor), then previously paid unto the Government by the contractor.

(3) It is expressly agreed that, should the contractor at any time default in any of the payments required by it to be made unto the Government under the provisions of this Article III, the Government may, at its election,

(*a*) waive such default; or

(*b*) treat and regard the hereby given lease and obligation and privilege to purchase as forfeited; or

(*c*) treat and regard the hereby given lease as a continuing legal and binding obligation, but the obligation and privilege to purchase as forfeited.

In the event of the Government making election (*b*) or election (*c*) supra, any and all payments made prior then to by the contractor, shall, *supa facto*, be forfeited to and become the absolute property of the Government, free from any and all claims and are equities of the contractor.

* * * * *

ARTICLE VI

The Government may, at its option, instead of requiring a deed to the land on which said plant is situated, pursuant to Article II of this contract, elect to become satisfied with the present lease to the said land now in force, and in such case the contractor agrees to give renewals of said lease from time to time as demanded by the Government in order to carry out the terms of this contract, and this instrument shall operate as renewals of said lease in case such deed is not given and in case such renewals are not otherwise given to the satisfaction of the Government.

Pursuant to this supplemental contract the Chemical Company, under date of April 10, 1919, deeded the land now in question to the United States. (R. 29, 30.)

SPECIFICATION OF ERRORS

The United States contends that the court below erred in the following particulars:

(1) In holding that title to the land in question was in the Iron Company and not in the United States. (Assignments II, VII, and VIII, R. 90, 91.)

(2) In holding that the United States had notice, actual or constructive, of the right of the Iron Company to demand a reconveyance of the land from the Chemical Company. (Assignments III, IV, and V, R. 90, 91.)

(3) In holding that the United States had no right, title, or interest in the land superior to the right, title, or interest of the Iron Company, except the right to remove the improvements and structures erected upon the land within a period of six months. (Assignments I and VI, R. 90, 91.)

SUMMARY OF ARGUMENT

I. Title to the land passed from the Iron Company to the Chemical Company, and from the Chemical Company to the United States, despite the fact that the Iron Company was erroneously described in its deeds as an Alabama corporation. If the true owner of lands conveys it by any name, the conveyance will transfer title, and parol evidence is admissible to identify the actual grantor. In this case there was not even a misnomer of the Iron Company, and the erroneous description of it was mere surplusage.

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II. The United States purchased the land for value without notice of the right of the Iron Company to demand a reconveyance of the land from the Chemical Company. That the United States paid value for the land is not questioned. The burden of proving that the United States had notice of the Iron Company's equitable claim is upon the Iron Company. The Iron Company has failed to sustain this burden. That the United States knew that the Chemical Company had a contract with the Iron Company for the supply of materials does not justify an inference that the United States had notice, or charge the United States with notice, of anything in that contract relating to the title to the land. There are no other facts in the record giving rise to an inference of notice, and the Iron Company has not alleged that the United States had any notice other than such as might be inferred from the recital in its contract with the Chemical Company.

III. The deed from the Chemical Company to the United States was in effect only a mortgage, which the contract between the Iron Company and the Chemical Company permitted to be placed on the land in priority to the right of the Iron Company to receive a reconveyance. The deed merely subjected the land to the contract of January 25, 1919, between the Chemical Company and the United States, which was an executory contract of sale by the United States to the Chemical Company. Under the Alabama law an executory contract of sale is the equivalent of a deed by the vendor and

a contemporaneous mortgage by the vendee to secure payment of any unpaid portion of the purchase money. While the United States may not be entitled under its bill, unless amended, to have the deed enforced as a mortgage, nevertheless if the deed was in reality a mortgage the courts below erred in granting the Iron Company affirmative relief on its counterclaim and in decreeing that the United States had no claim to or interest in the land. That the United States contended in the lower courts that it was the absolute owner of the land should not preclude it from here asserting a right less than absolute ownership.

ARGUMENT

I

TITLE TO THE LAND PASSED FROM THE IRON COMPANY TO THE CHEMICAL COMPANY, AND FROM THE CHEMICAL COMPANY TO THE UNITED STATES, DESPITE THE FACT THAT THE IRON COMPANY WAS ERRONEOUSLY DESCRIBED IN ITS DEEDS AS AN ALABAMA CORPORATION

All of the authorities agree that if the true owner of land conveys it by any name, the conveyance as between the grantor and grantee will transfer title. The question in such a case is whether the grantor intends to bind himself, and parol evidence is admissible to identify the actual grantor. (*Wakefield* v. *Brown,* 38 Minn. 361; *Precious Blood Society* v. *Elsythe,* 102 Tenn. 40; *Clement* v. *City of Lathrop,* 18 Fed. 885; *Douglas & Easton* v. *The Branch Bank*

at Mobile, 19 Ala. 659; *Fallon* v. *Kehoe,* 38 Cal. 44; *Emery* v. *Kipp,* 154 Cal. 83; *Hartman* v. *Thompson,* 104 Md. 389; *Thomas* v. *Wyatt,* 31 Mo. 188; *Rupert* v. *Penner,* 35 Neb. 587; *New York African Society* v. *Varick,* 13 Johns (N. Y.) 38; *David* v. *Williamsburgh, etc. Ins. Co.,* 83 N. Y. 265.)

In this case there was not even a misnomer of the Iron Company in its deeds. The grantor was named as "Shelby Iron Company," the correct corporate title. The deeds were executed and acknowledged by the "Shelby Iron Company." The president of the Iron Company signed them under authority of its board of directors and pursuant to the contract between the Iron Company and the Chemical Company. He had no authority to sign any such deeds in behalf of the Alabama Company. The Chemical Company went into possession under the deeds. The only irregularity in the deeds was that some attorney, who drew them, by mistake described the Iron Company as "incorporated under the laws of the State of Alabama." (R. 43, 44, 56.) We think it clear that this misdescription was mere surplusage and that the deeds passed legal title from the Iron Company to the Chemical Company.

The Alabama Company, it should be noted, had had no property since 1890, and no one had any idea that it had anything to do with the transactions with the Chemical Company. In *Peabody* v. *Brown,* 10 Gray (Mass.) 45, it was held that a deed to "Hiram Gowing, cordwainer," might be

shown by parol evidence of the previous negotiations between the parties to have been intended for "Hiram G. Gowing," who was a person of middle age, and not for "Hiram Gowing" his son, who was but thirteen years old.

II

THE UNITED STATES PURCHASED THE LAND FOR VALUE WITHOUT NOTICE, ACTUAL OR CONSTRUCTIVE OF THE RIGHT OF THE IRON COMPANY TO DEMAND A RECONVEYANCE OF THE LAND FROM THE CHEMICAL COMPANY

It is not questioned that the United States paid value for the conveyance to it of the land. The deed to it was made pursuant to the supplemental contract with the Chemical Company, dated January 25, 1919 (H. 59–64), which was to "provide for and constitute a full and final settlement of all rights and obligations, claims, and demands, of either party against the other, and of all questions under or growing out of" the prior contracts. The United States agreed upon a fixed sum to be paid the Chemical Company for the expenses and obligations it had incurred, surrendered its right to receive acetate of lime and methyl alcohol, and agreed to sell the land and plant to the Chemical Company for a fixed sum payable in installments instead of standing upon the provision of the contract of April 23, 1918, requiring the Chemical Company to purchase the plant at an appraised valuation. (R. 27–28.)

The burden of proving that the United States had notice of the Iron Company's equitable claim is upon the Iron Company

The question, then, is whether the United States had notice of the right of the Iron Company to demand a reconveyance of the land from the Chemical Company. As a preliminary to consideration of this question, it is essential to determine whether the Iron Company has the burden of proving that the United States had notice of the Iron Company's equitable right or the United States has the burden of proving lack of notice of such right. We believe that the weight of authority in the Federal courts, and probably also in the State courts, is to the effect that one seeking to set up a collateral equitable right against a holder of legal title has the burden of proving that the legal owner had notice of his equity. (See 27 Ruling Case Law, 718.)

Calais Steamboat Company v. *Van Pelt's Administrator,* 2 Black (67 U. S.) 372, seems conclusive of the question in this Court. In that case it was held that if the equitable owner of a thing has permitted another to hold the legal title accompanied by the usual documentary evidence of it, with possession, the burden of proof rests upon the equitable owner, in a contest with a purchaser for value, to show that the purchaser had notice of his equity in due time.

Gratz v. *Land & River Imp. Co.* (C. C. A. 7th Circuit), 82 Fed. 381, certiorari denied 173 U. S. 705, involved a contest between the holder of a deed prior in point of time but subsequent in point of

record, and the holder of a deed subsequent in date but prior of record. The position of a holder of a prior unrecorded deed is certainly at least as strong as that of one claiming merely an equitable right. On pages 385–386, the court said:

> It is further objected that the deed from Herbert to Mitchell, being prior in point of time, although subsequent in point of record, was effectual to pass the title of the premises, and was valid against the whole world, except bona fide purchasers for value, without notice, and that the burden of proof with respect to the bona fides of the deeds subsequent in date, but prior of record, is cast upon those claiming under them. This presents a question not altogether without difficulty, and in respect to which the authorities are not wholly at agreement. *Jackson* v. *M'Chesney,* 7 Cow. 360; *Wood* v. *Chapin,* 13 N. Y. 509; *Shotwell* v. *Harrison,* 22 Mich. 410; *Hoyt* v. *Jones,* 31 Wis. 389, 404; *Lampe* v. *Kennedy,* 56 Wis. 249, 14 N. W. 43; *Cutler* v. *James,* 64 Wis. 173, 179, 24 N. W. 874; *Prickett* v. *Muck,* 74 Wis. 199, 206, 42 N. W. 256. In the State of New York it is ruled that under the recording act the junior purchaser, whose deed is first recorded, is presumptively a bona fide purchaser for a valuable consideration, without notice, and that the burden of proof to the contrary rests upon the senior purchaser, whose deed has not been recorded. In Michigan it is held that the burden is upon him who claims by virtue of priority of record to show

affirmatively the payment of a valuable consideration, but that the burden is upon him claiming under a deed of prior date, but subsequent record, to show that such purchaser under the deed having priority of record had notice of the prior unrecorded deed. This ruling is founded upon the notion that, the payment of the purchase price being peculiarly within the knowledge of the grantee under the deed having priority of record, the law would not impose the burden of proving the negative fact upon the opposite party. In this case there was a very able and strong dissent by Campbell, C. J., to the effect that there is no ground for any such distinction, and that the burden rests upon the party claiming under the unrecorded deed. In *Hoyt* v. *Jones* the supreme court of Wisconsin for the first time considered the subject, and, in an able opinion by Chief Justice Dixon, concurred with the dissenting opinion of Chief Justice Campbell, and with the decisions of the state of New York, and held that the law would not presume fraud or bad faith on the part of the subsequent purchaser, and that the grantee under the unrecorded deed, being a party in the wrong, by omitting to record his deed, must assume the burden of showing a want of consideration or notice in the purchaser under the deed having a priority of record; and this, we think, is the better rule, because, as suggested by Chief Justice Campbell, any other doctrine would render the registry laws of very little value, especi-

ally in a case like the present, in which we are dealing with transactions of over 40 years ago.

The same rule has been applied in *White* v. *McGarry* (C. C. W. D. Mich.), 47 Fed. 420; *The Richard J. Carney* (C. C. A. 7th Cir.), 53 Fed. 927; *In re Ducker* (C. C. A. 6th Cir.), 134 Fed. 43; *Houston Oil Co. of Texas* v. *Goodrich* (C. C. A. 5th Cir.), 226 Fed. 434; certiorari granted, 241 U. S. 657, certiorari dismissed as improvidently granted, 245 U. S. 440; *Grogg* v. *Stevens* (C. C. A. 4th Cir.), 6 F. (2d) 862; *United States* v. *Wythe County Iron & Zinc Corporation* (D. C. W. D. Va.), 11 F. (2d) 971, 977; and *Gill* v. *Colton* (C. C. A. 4th Cir.), 12 F. (2d) 531; in most of which cases the courts apparently applied the law of the State in which the property was located. See also *Pickett* v. *Foster,* 149 U. S. 505, 523, 524. The contrary view appears to have been taken in *Keith Lumber Co.* v. *Houston Oil Co.* (C. C. A. 5th Cir.), 257 Fed. 1, certiorari denied, 250 U. S. 666, but this decision was based, in part at least, upon the peculiar provisions of the Texas recording act under consideration.

It may be, although we have found no direct authority, that the question is so far one of local law, depending upon the construction to be given the State recording acts, that the Federal courts should apply the law of the State where the property is situated. In *De Vaughn* v. *Hutchinson,* 165 U. S. 566, this Court said, on page 570:

> It is a principle firmly established that to the law of the State in which the land is

> situated we must look for the rules which govern its descent, alienation and transfer, and for the effect and construction of wills and other conveyances.

If the State law governs, there can be no question that the law of Alabama supports the rule for which we are here contending. In *Barton* v. *Barton,* 75 Ala. 400. 402, the court said:

> The rule as to proof of *bona fide* purchase is, that the party pleading it must first make satisfactory proof of purchase and payment. This is affirmative, defensive matter, in the nature of confession and avoidance, and the burden of proving it rests on him who asserts it. *Ei incumbit probatio, qui dicit.* This done, he need not go further, and prove he made such purchase and payment without notice. The burden here shifts, and if it be desired to avoid the effect of such purchase and payment, it must be met by counter proof, that, before the payment, the purchaser had actual or constructive notice of the equity or lien asserted, or, of some fact or circumstance, sufficient to put him on inquiry, which, if followed up, would discover the equity or encumbrance.

The same view was taken in *Center* v. *The P. & M. Bank,* 22 Ala. 743; *Bartlett* v. *Varner's Executor,* 56 Ala. 580; *Hodges* v. *Winston,* 94 Ala. 576; *Coskrey* v. *Smith,* 126 Ala. 120; *Scotch Lumber Co.* v. *Sage,* 132 Ala. 598; *Ely* v. *Pace,* 139 Ala. 293; *Arnett* v. *Handley,* 185 Ala. 119; and *Holly* v. *Dinkins,* 202 Ala. 477.

Even if the Federal courts are not absolutely bound to apply the Alabama law, it would seem that in the absence of a clearly established Federal rule to the contrary, the Alabama law should be very persuasive. The property is located in Alabama and the case was tried in that State, and it is a fair assumption that the parties have acted throughout with reference to the law of Alabama.

There is nothing inconsistent in *Wright-Blodgett Co.* v. *United States,* 236 U. S. 397, and other similar cases. In that case the United States brought suit to annul certain land patents on the ground that the entrymen had defrauded the United States in securing the patents. The Court held that while *bona fide* purchase for value would be a perfect defense if established by grantees of the entrymen, the burden was upon them to prove purchase for value and lack of notice.

In such cases the fraud or equity which is alleged to defeat the legal title arises in the direct line by which the legal title has descended; the owner of the legal title has derived his title through the fraud. The underlying reason for the rule that the burden of showing that he is a *bona fide* purchaser for value is on the owner of the legal title in such cases, is well stated in *Seymour* v. *McKinstry,* 106 N. Y. 230, 240, as follows:

> The reason for this rule may be the same ascribed to the doctrine which requires the holder of a note, shown to have been fraud-

> ulently obtained, to prove under what circumstances and for what value he became the holder, viz.: That when there is fraud the presumption is that he who is guilty will part with the instrument for the purpose of enabling some third person to recover upon it, and such presumption operates against the holder and it devolves upon him to show affirmatively the facts essential to overcome that presumption and relieve himself from its effect.

Obviously this reason is wholly inapplicable in a case, like the present, where a mere collateral equity is asserted to defeat a legal title which is not tainted by fraud. In this case the Iron Company itself, uninfluenced by fraud, conveyed the title to the Chemical Company and attempted by an unrecorded contract [1] to reserve a right to a reconveyance. The Chemical Company conveyed the title to the United States subject to an executory contract for its repurchase, which, if carried out, would have permitted compliance with the Chemical Company's obligation to the Iron Company. Title was therefore properly vested in the United States, and the Iron Company is seeking to defeat that title by asserting an equitable right based upon an

[1] There is no testimony as to whether or not the contract between the Iron Company and the Chemical Company was recorded. It may fairly be assumed, however, that it was not, because all of the deeds placed in evidence show recording (R. 31, 33, 34, 35), while the contract does not. In addition, both of the lower courts evidently treated the contract as unrecorded.

unrecorded instrument which was not a part of the chain of title. Under these circumstances the Iron Company, whose failure to make its rights a matter of record has caused the present conflict, should have the burden of showing that the United States received the actual notice which would make the lack of recording immaterial.

The distinction between cases where there is fraud in the direct line by which legal title passes, and cases where a collateral equitable claim is asserted is similar to that pointed out by this Court with respect to negotiable instruments in *Pana* v. *Bowler,* 107 U. S. 529, 541, 542, as follows:

> It is a general rule that when the holder of a negotiable instrument, regular on its face and payable to bearer, produces it in a suit to recover its contents, and the same has been received in evidence, there is a *prima facie* presumption that he became the holder of it, for value at its date, in the usual course of business. * * *
>
> * * * The exception relied on by the plaintiff in error is well settled, and is this: if, in a suit brought by the indorsee or transferee of a negotiable instrument, the maker or acceptor, or any party who is primarily bound by the original consideration, proves that there was fraud or illegality in the inception of the instrument, the burden of proof is thrown on the plaintiff to show that he is a holder for value.

While it is no doubt true that the general rule stated above with respect to negotiable instruments

is partly based upon the desire of the courts to permit such instruments to circulate as freely as possible, it would seem that similar considerations should apply for the protection of record titles to real estate against unrecorded equitable claims.

The Iron Company has failed to sustain the burden of proving that the United States had notice of its equitable right

Both lower courts decided that the United States had actual notice of the Iron Company's right, basing this decision upon the recital of the original contract between the United States and the Chemical Company which stated that the Chemical Company had a contract with the Iron Company whereby it was to receive a supply of wood, and the argument that it was inconceivable that the United States would have agreed to finance the Chemical Company unless it knew the terms of the contract between the Iron Company and the Chemical Company.

It is, of course, well settled that ordinarily this Court will not reverse the concurring decisions of two lower courts upon a question of fact, but it is equally well settled that it may do so in an equity case where there is a clear preponderance of evidence against their conclusions. (*The Lady Pike,* 21 Wall. 1, 8; *The Iroquois,* 194 U. S. 240, 247; *United States* v. *Stinson,* 197 U. S. 200, 207; *United States* v. *Clark,* 200 U. S. 601, 608.) We believe that in this case the evidence so clearly fails to sus-

tain the finding of the lower courts as to justify fully a reversal by this Court of their finding. The finding is not based on any testimony and it can not be argued that the trial court had the advantage of observing witnesses; it is based upon a mere inference from a written document, and we think it can be demonstrated that the inference was not justified.

The Circuit Court of Appeals, in addition to finding that the United States had actual notice, held that the facts were sufficient to impute notice to it. As the same facts were relied on for each holding, the question seems to be the same in each case, whether the information possessed by the United States was sufficient to cause it to investigate, and the same argument is equally applicable to show that actual notice was not proven and that notice should not be imputed to the United States.

All of the authorities which we have been able to find negative the proposition that notice of a contract for the supply of materials justifies an inference of notice of anything in that contract which does not relate to the supply of materials. There is no evidence in the record to show what importance the United States attached to the contractual obligation of the Iron Company to supply the Chemical Company with wood, except the testimony of Mr. Bush, President of the Iron Company that he was told by the president of the Chemical Company that the United States would not make a contract with

the Chemical Company until the latter had made a contract with someone for a supply of wood and other facilities. (R. 45.)

This is clearly of no value as evidence of the real attitude of the United States. It may be that wood was plentiful in the vicinity of Shelby and that the United States thought it unnecessary to look into the contract between the Chemical Company and the Iron Company because it believed that if an adequate supply of wood was not forthcoming thereunder other arrangements for such a supply might easily be made. It may be that as the United States had sufficient confidence in the Chemical Company to agree to erect a $400,000 plant for it to operate, it thought it could rely on the Chemical Company to procure a supply of wood and need not investigate the matter. It is certainly true that the original contract with the Chemical Company was made during the war when contracts were made hastily, by agents of the United States with little experience in such matters, and without the investigation which might be made at other times. Any of these things, and perhaps many others, might explain and justify a failure by the United States to examine the contract between the Iron Company and the Chemical Company.

In 20 Ruling Case Law, 346, 349, 350, the rule is stated as follows:

> Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowl-

> edge are at hand; and if he omits to inquire he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. * * *
>
> No general rule can be laid down by which to determine what facts are sufficient to excite inquiry; each case must to a great extent be decided on its own facts. * * *
>
> * * * To charge one with notice, however, the facts must be such as ordinarily to excite inquiry with reference to the particular fact which the inquiry is designed to elicit.

The proposition stated in the last sentence of the above quotation is supported by the following cases: ***Rogers*** v. ***Rawlings*** (C. of A., D. C.), 298 Fed. 683; ***Mueller, etc.,*** v. ***Engeln, etc.,*** 75 Ky. 441; *Anderson* v. ***Blood,*** 152 N. Y. 285. See also 2 Pomeroy's Equity Jurisprudence (4th Ed.), Section 629, p. 1208 *et seq.*

In *United States* v. *Detroit Lumber Co.,* 200 U. S. 321, a suit to annul land patents on the ground that they had been obtained by fraud on the part of the defendant's grantor, it was claimed that the defendant was not a *bona fide* purchaser because notice of the fraud might have been obtained from account books of the grantor which had been turned over to the defendant. The Court, overruling this contention, said (p. 332):

> No one is bound to assume that the party with whom he deals is a wrongdoer, and if he presents property, the title to which is apparently valid, and there are no circum-

> stances disclosed which cast suspicion upon the title, he may rightfully deal with him, and, paying full value for the same, acquire the rights of a purchaser in good faith. *Jones* v. *Simpson,* 116 U. S. 609, 615. He is not bound to make a searching examination of all the account books of the vendor nor to hunt for something to cast a suspicion upon the integrity of the title.

It is settled law that the recording of an instrument which is ineligible for record under the recording acts has no effect as notice to subsequent purchasers. (*Lewis* v. *Barnhart,* 145 U. S. 56, 76–79; *Lynch* v. *Murphy,* 161 U. S. 247, 253, 254.) Yet if the theory of the lower courts in this case be sound, such recording would in every case justify an inference of notice, for surely it is no more inconceivable that the United States did not examine the contract between the Iron Company and the Chemical Company than that anyone should purchase real property without examining the records affecting the title.

We think there can be no doubt that the sound rule is that one is charged with notice, or can be inferred to have notice, only of such things as reasonably appear from the information in his possession to be discoverable by investigation; and that information that a contract for supplies exists can not be treated as a basis for notice of a claim against land.

No other facts giving rise to an inference of notice appear in the record, and the Iron Company has not alleged that the United States had any notice other than such as might be inferred from the recital in its contract with the Chemical Company. Mr. Bush testified that the plant built by the United States under the contract with the Chemical Company should be operated in connection with the Iron Company's plant (R. 41, 42, 46, 47), but it is manifest that in so testifying he was thinking of the period in 1922 and 1923 when the Iron Company wanted to buy the plant.

There is no evidence that the parties thought when the plant was built and the land acquired by the United States that the plant could not be operated separately from the Iron Company's plant, and the fact that the Iron Company had deeded the land to the Chemical Company, an entirely independent corporation, would have negatived any inference of ownership on the part of the Iron Company which the United States might have drawn from the physical location of the land.

No inference against the United States can fairly be drawn from the failure of the officer who made the contract of April 23, 1918, between the Chemical Company and the United States, to testify. Only a small percentage of those who were officers of the army during the War are still in the service. There is nothing in the record to show the present whereabouts of the officer in question or whether he could have been obtained as a wit-

ness. In addition, it is entirely possible that if he had been subpœnaed as a witness he would have had no recollection of the circumstances surrounding the making of the contract. During the War contracts were made hastily and in great numbers, and it is doubtful whether any officer charged with the making of contracts for war materials could now remember the circumstances surrounding more than a small proportion of the contracts negotiated by him.

Nor can any inference that the United States had notice of the contract between the Iron Company and the Chemical Company be drawn from the fact that the contract of April 23, 1918, between the Chemical Company and the United States, contemplated the surrender of the land and the removal of the plant by the United States at the termination of the War. It is clear that at the time the contract was made the United States was interested almost exclusively in obtaining material for use in the War. It is apparent from the contract that at that time it was a matter of no concern to the United States what happened to the land after the termination of the War. Under these circumstances the United States naturally would not be interested in the motives of the Chemical Company in desiring the land to be returned to it when the War ended. Therefore, it can not be inferred that the United States knew that the Chemical Company wanted the land returned to it at the end of the War in order that it might reconvey the land to the Iron Company.

III

THE DEED FROM THE CHEMICAL COMPANY TO THE UNITED STATES WAS IN EFFECT ONLY A MORTGAGE, WHICH THE CONTRACT BETWEEN THE IRON COMPANY AND THE CHEMICAL COMPANY PERMITTED TO BE PLACED ON THE LAND IN PRIORITY TO THE RIGHT OF THE IRON COMPANY TO RECEIVE A RECONVEYANCE

Paragraph Eighth of the contract between the Iron Company and the Chemical Company, which provided for the reconveyance of the land to the Iron Company, provided that at the time of such reconveyance the land should be—

> free and clear of any encumbrances or liens whatsoever, or if there is any mortgage or there are any mortgages on the same not yet due, the Chemical Company shall pay over to the Iron Company the amount thereof or the amount of any bonds outstanding thereunder, with any accrued interest thereon. (R. 17.)

Clearly, therefore, the parties contemplated that the Chemical Company might mortgage the land, and that if it did so the land might be reconveyed to the Iron Company subject to such mortgage or mortgages. The Iron Company was content to look to the Chemical Company for payment of an amount sufficient to protect it against any such mortgage or mortgages. The parties no doubt contemplated that the Chemical Company might have to mortgage the land in order to erect or acquire

its plant, and the Iron Company consented that the Chemical Company might do this.

While the deed from the Chemical Company to the United States was absolute in form, the Court may, of course, look beyond the terms of the instrument to the real transaction. In *Peugh* v. *Davis,* 96 U. S. 332, this Court said, at page 336:

> It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for a loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. * * *
>
> It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has, in a court of equity, a right to redeem the property upon payment of the loan. This right can not be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates.

In *Robinson* v. *Farrelly,* 16 Ala. 472, the court said (p. 476):

> The rule is unquestionably settled, that if the transaction was intended as a mere security for a debt, whatever may be the form of the instrument, it must in a court

> of equity be considered a mortgage. * * *
>
> It is equally true, that if the parties intended, at the time the instrument was executed, that it should be a security for a sum of money, due by the vendor to the vendee, no words used in the instrument can cause it afterwards to operate as a sale, and not as a mortgage; for if the transaction in its inception was a mortgage, a court of equity can not permit it to be converted into an absolute purchase by a mere default in the payment of the mortgage money at the appointed time. The rule is, once a mortgage, always a mortgage.

The deed from the Chemical Company to the United States was made pursuant to the contract of January 25, 1919. The Chemical Company never surrendered possession of the land, and contemporaneously with the conveyance of the land it became subject to all the terms and conditions of the contract. The sole effect of the deed was to subject the land, as well as the plant which already belonged to the United States, to the terms of the contract. The true nature of the transaction between the parties, therefore, depends upon the effect of the contract.

While the contract purported to provide for a lease to the Chemical Company by the United States until the Chemical Company had fully paid for the plant, and thereafter a sale and conveyance to the Chemical Company by the United States, it seems clear that the transaction was in effect merely

an executory contract of sale with the purchase price payable in installments, and that there was no real lease. The contract stated that the fair commercial value of the plant was not in excess of $260,000. It provided that the Chemical Company should pay at once $50,000, and should pay $50,000 in one year, $75,000 in two years, and $85,000 in three years, all of which sums should apply as rental for the property during that period. At the end of three years the United States was to sell and convey the property to the Chemical Company for a consideration of $1.00. The sum of the so-called rentals, therefore, all payable within three years, was the exact amount fixed as the fair commercial value of the plant. Clearly the amounts payable were fixed with reference to the sale value and not the rental value of the property. This is further indicated by the fact that the Chemical Company might at any time prior to the expiration of the three years obtain a conveyance of the property by paying a sum equal to the difference between $260,000 and the total sum of all rents previously paid by the Chemical Company. It is also to be noted that the sum of the so-called rentals was the fair commercial value of the plant alone, nothing being added for the value of the land.

It is beyond question that under the Alabama law an executory contract of sale is the equivalent of a deed by the vendor and a contemporaneous mortgage by the vendee to secure payment of any unpaid portion of the purchase money. In *Lowery*

v. *Peterson,* 75 Ala. 109, 111, which was a bill by an assignee of the unpaid balance of purchase money against the vendor and the vendees for the purpose of having declared and enforced a lien on the land for the payment of the amount of the purchase money claimed by him, the court said:

> When, as in the present case, a vendor of lands retains in himself the legal title, covenanting or agreeing to convey it at a future day, upon condition that the vendee makes payment of the purchase money, he carves out his own security, which is in the nature of a mortgage, and to which all the essential incidents of a mortgage attach. The relation of the parties is analogous to, if not precisely, that which would have been created, if the vendor had made a conveyance of the legal estate, and, contemporaneously, the vendee had executed a mortgage to secure the payment of the purchase money. For, as has been justly observed, there can not be a sensible distinction drawn between the case of a legal title conveyed to secure the payment of a debt, and a legal title retained to secure payment.

In *Moses Brothers* v. *Johnson,* 88 Ala. 517, in which a vendee in possession was enjoined from cutting timber on the land and thereby impairing or endangering the vendor's security, the court said, on page 520:

> When a vendor of real estate enters into an executory agreement to convey title on the

> payment of the purchase money, he sustains, in substance, the same relation to the vendee, as a mortgagee does to a mortgagor. Each has a legal title, which, in the absence of stipulations for possession, will maintain an action of ejectment. Each can retain his legal title against the other party until the purchase money, or mortgage debt, is paid, unless he permits the other to remain in undisturbed possession for twenty years. And yet each is at last but a trustee of the legal title for the mortgagee [mortgagor] or vendee, if the purchase money or mortgage debt, as the case may be, is paid or seasonably tendered. The same mutual rights and remedies, legal and equitable, and the same limitation to the right of recovery, obtain in the one relation and in the other.

In *Loventhal* v. *Home Insurance Co.*, 112 Ala. 108, it appeared that Mrs. Loventhal was a vendee in possession under an executory contract to purchase. She sought to recover on a fire insurance policy which provided that it should be void if the interest of the insured were other than unconditional and sole ownership, or if the subject of insurance were a building on ground not owned by the insured in fee simple. On page 114 the court, after referring to a number of cases dealing with the relation of vendor to vendee, said:

> In view of these unassailable principles, we must regard Mrs. Loventhal as owner of

the property; and just such an owner as she would have been, if her vendor had conveyed to her, by deed, the entire, absolute and unconditional estate therein, in fee simple, and she had reconveyed it to him, by way of mortgage, to secure payment of the purchase money. Then the simple question is, was that interest, so held by her, unconditional and sole ownership; or was the ground owned by her "in fee simple," within the meaning of the policy?

In *Love* v. *Butler,* 129 Ala. 531, 537–538, the court said:

> It is clear from the principles announced in the cases cited above, that the reservation of the legal estate by the vendor, as a security for his debt, is in equity nothing more than an equitable mortgage * * *. After the law day of the mortgage, the mortgagee is clothed with the legal title, with an immediate right to the possession. So in the case of vendor and purchaser, under a contract such as is disclosed in this case, the vendor has the legal title and upon a breach of a condition of the bond by the purchaser is entitled to the possession. Should he take possession, there can be no doubt but that the purchaser has the right to redeem the lands, just as a mortgagor would have in case the mortgagee takes possession.

Other cases applying the same rule are:

Conner v. *Banks,* 18 Ala. 42;
Kelly v. *Payne,* 18 Ala. 371;

Relfe v. *Relfe,* 34 Ala. 500;
Bankhead v. *Owen,* 60 Ala. 457, 466;
Wolffe v. *Nall,* 62 Ala. 24;
Chapman v. *Lee,* 64 Ala. 483;
Walker v. *Crawford,* 70 Ala. 567;
Janney & Cheney, Trustees, v. *Habbeler,* 101 Ala. 577;
Hester v. *Hunnicutt,* 104 Ala. 282.

In *Hardin* v. *Boyd,* 113 U. S. 756, 765, this Court applied the Arkansas law that the vendor, under an executory contract of sale, occupies the position of a mortgagee, because "the legal effect of a title bond is like a deed executed by the vendor and a mortgage back by the vendee."

It is no doubt true that the United States is not entitled under its bill to a decree for the balance of the purchase money due under its contract with the Chemical Company, and to enforce a lien on the property for the payment thereof, although the bill might properly have been amended to pray for such relief. (*Hardin* v. *Boyd, supra.*) But in this case the trial court not only denied the prayer of the bill, but also granted the prayer of the Iron Company's counterclaim and decreed that as between the United States and the Iron Company the title to the land was in the Iron Company and the United States had no claim to or interest in the land.

If, as we think we have established above, the United States is in the position of a mortgagee

with title to, or a right in, the land to secure payment of the unpaid portion of the purchase money under the contract of sale to the Chemical Company, then the courts below were in error with respect to so much of the decree as granted affirmative relief to the Iron Company.

It may be contended that it was not argued in the lower courts that the deed from the Chemical Company to the United States was in effect a mortgage, and therefore that the question can not be raised in this Court. In the lower courts the Iron Company and the United States each contended that it was absolute owner of the land. This claim on behalf of the United States may have been too broad, but that should not preclude it from here asserting a right less than absolute ownership. That the deed was in effect a mortgage is a necessary legal conclusion from the papers put in evidence and before the courts for construction. The Iron Company undoubtedly put in evidence everything tending to support its claim of absolute title and has not been prejudiced. In *Watts* v. *Waddle,* 6 Pet. 389, a suit by a vendor for specific performance, this Court held that the complainant was not entitled to the relief asked in the bill, but was entitled to a decree for the rents and profits of the land while it had been in the possession of the vendee, although such relief had not been asked in the court below.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed.

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